2003

Paul Hammer v. Workforce Appeals Boardm Department of Workforce Services : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

Paul Hammer, Petitioner vs. **Workforce Appeals Board, Department of Workforce Services,** Respondent	Appeal No. 20030558-CA Priority No. 7

REPLY BRIEF FOR THE PETITIONER

APPEALING THE DECISION OF
THE BOARD OF APPEALS FOR THE
DEPARTMENT OF WORKFORCE SERVICES
(Department of Workforce Services Case No. 03-B-268)

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Argument

1. The Department of Workforce Services (DWS) failed to abide by their own rule requiring an analysis of time in school and financial loss when a claimant expresses a willingness to leave school for work, and such failure is arbitrary and capricious action.

U.A.C. R994-403-117c provides that when a claimant expresses a willingness to leave school for work the factors to be considered against such a claim are the time already invested in school and the financial loss that would accrue for leaving school.[1] The rule is not discretionary; it provides that these factors "must be weighed" against the claimant's expressed intent to leave school. The rule does not suggest that other factors, such as renting a home, making arrangements for school prior to losing employment, or even moving to attend school are factors in considering the credibility and intent of the claimant who expresses the intent to leave school for work.

Nothing in the record, nor in the DWS brief provides adequate analysis on the two required factors in considering the Petitioner's claim. The DWS brief even states the rule, but fails to provide any helpful analysis with respect to these factors. *Respondent's brief at 6-7.*

The financial analysis is incomplete because the DWS does not even attempt to determine the amount of financial loss, relying instead on inferences to be drawn from the amounts found in the record which were only cursorily examined in the hearing and conclusory statements. *Id.* The DWS appears to rely heavily on the amount of student

[1] Petitioner's expression of this intent is found at R. 16:31-42.

loans, ignoring completely the reality that those loans were also used to provide family needs. The legislature specifically mentioned these same family needs in the policy underlying unemployment benefits. U.C.A. § 35A-4-102. Furthermore, when benefits were denied in early January 2003, 100% of the Spring semester tuition was still refundable, another reality that is completely ignored in the DWS' incomplete financial analysis.

The time in school factor is given even less consideration. The DWS brief mentions only that at the time of the hearing there was six weeks of schooling left. *Respondent's brief at 7.* The conclusory statement is based on conditions at the time of the hearing, rather than at the time when benefits were actually denied (some 2 ½ months prior to the hearing). There is no analysis in the record or brief that suggests or implies that completion of one semester (of a six semester endeavor) is such a substantial investment that one would be unlikely to abandon the pursuit. Even at the time of the hearing only about half of the Spring semester had been completed (or approximately one-quarter of the total education required for graduation in this case). It is arguable that the lion's share of the school work for that semester had not been completed at the time of the hearing (since large paper assignments become due toward the end of the semester, and preparation for final exams had not even begun). Thus, though the DWS implies that the first year was almost complete, an arguably more accurate statement is that less than half of the Spring semester requirements had been completed at the time of the hearing, and that less than one-quarter of the total requirements for graduation where complete.

Such incomplete analysis should not be the basis for a determination against the Petitioner. *Adams v. Board of Review of Indus. Com'n*, 821 P.2d 1 (Utah Ct. App. 1991) (failure of agency to make adequate findings supporting a conclusion can result in resolution of issue in petitioner's favor), *also Petitioner's Brief at 12-16.* Even if this court were to accept the conclusory statements, the DWS has arbitrarily and capriciously molded the conclusions without adequately considering the requirements of the rule. "[A]dministrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by the agency to suit its own purposes. Such is the essence of arbitrary and capricious action." *R.O.A. General, Inc. v. Utah Dept. of Transp., Dist. Three*, 996 P.2d 840, 842 (Utah 1998) (alteration in original) (citing *State ex rel. Dep't of Community Affairs v. Utah Merit Sys. Council,* 614 P.2d 1259, 1263 (Utah 1980)). Even if the court allows considerations beyond those stated in the rule, the DWS's failure to adequately consider the factors *required* by the rule is arbitrary and capricious action.

2. The substantial evidence standard for upholding an agency factual conclusion requires that the conclusion is reasonable and rational.

When challenging an agency's factual conclusions an appellant must marshal all evidence supporting the agency finding, and show that the findings are not supported by substantial evidence. *Kennecott Corp. v. Utah State Tax Comm'n,* 858 P.2d 1381, 1385 (Utah 1993).

> "Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. This standard does not require or specify a quantity of evidence but requires only such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

WWC Holding Co., Inc. v. Public Service Com'n of Utah, 44 P.3d 714, 718 (Utah 2002) (quoting *Harken Southwest Corp. v. Bd. of Oil, Gas and Mining*, 920 P.2d 1176, 1180 (Utah 1996)). Utah courts review "administrative conclusions under an intermediate standard of review and uphold[] them, so long as they are reasonable and rational." *Vernon C. Young, M.D., P.C. v. Board of Review of Indus. Com'n of Utah, Dept. of*, 731 P.2d 480, 482 (Utah 1986). However, in evaluating the evidence for a conclusion, the court "will not sustain a decision which ignores uncontradicted, competent, credible evidence to the contrary." *WWC Holding*, 44 P.3d at 718.

The issue here is really one of priority, was the Petitioner more intent on completing law school or working to provide for his family. If schooling was prioritized higher than finding work, then a conclusion that the Petitioner was not available for work is appropriate. In marshalling the arguments for why school would be more important than work, there are no uncontroverted justifications. The most obvious reason one would prioritize school over work is to achieve a better financial reward. However, this reasoning has little or no support in the record. In fact, a reasonable financial analysis suggests that Petitioner and his family are substantially worse off by incurring debt and foregoing the income that could be earned during the three years required for law school. *Petitioner's Brief at 14-15.*

The record does appear to show that Petitioner was willing to make substantial changes affecting his family in order to attend law school. For example, Petitioner rented his home and moved his family to a new area, despite Petitioner's desire to remain in Utah. (R. 15.) The record indicates this dilemma as a choice between remaining in Utah

unemployed, or moving and attending law school (R. 17.); yet the record also reveals that Petitioner's work search expanded to include jobs outside even Utah or Washington. (R. 19.) Thus, once Petitioner recognized a need to move outside Utah, his work search also expanded to other areas of the country.[2] Petitioner also expressed his willingness to move for work, indicating that Petitioner was willing to make substantial changes for work, even after having moved for school.

There is one other argument that Petitioner can marshal: If Petitioner intended only to attend school while he was employed, why did he continue to pursue school even after losing his job? The Petitioner was laid off in mid-April 2001 and began immediately searching for work. (R. 27, 15.) Completing additional applications to law schools (after becoming unemployed) occurred approximately at the end of June, indicating that 2 ½ months elapsed between getting laid-off and renewing the efforts for entering law school. (R. 17.) Thus, the record reveals that Petitioner's work search had continued unsuccessfully for some time before Petitioner continued pursuing law school. Petitioner's prospects for finding work appeared dim, and having been accepted to law school Petitioner faced a dilemma: remain in Utah, unemployed and searching for work, or make substantial changes to improve the likelihood of finding work (moving to a new area, expanding the work search, and beginning school in a new profession). Petitioner's choice was ratified by the DWS Board, who wrote:

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[2] Respondent's brief suggests that Petitioner moved to a less populous area and thus limited his work search. Since Petitioner's home was in Utah County, it would seem appropriate to compare Utah County with Spokane County. According to the US 2000 census data (available at www.census.gov), Spokane County is more populous than Utah County.

> "The Board is sympathetic to the claimant's dilemma. He, like others in this economy, is taking dramatic measures to increase his employability and financial stability. He recognizes the fickleness of the economy and wants to increase his employability while staying employed as best he can. Even though he would rather be working, he has attempted to make his period of unemployment productive by furthering his education."

(R. 34-35.) The Board also describes Petitioner's choice as reasonable. *Id.*

While these arguments establish that it is possible that Petitioner was more attached to school than he was to work, they do not address the uncontroverted evidence already presented: Petitioner desire to provide for his family's needs (*Petitioner's brief at 13*), and the uncertainty of finding work even after completing the education (*Petitioner's brief at 14*). As indicated above, the court should not favor the agency's conclusion when "uncontradicted, competent, credible evidence to the contrary" exists. *WWC Holding*, 44 P.3d at 718. Such evidence exists, and the DWS failed to include any consideration of that evidence. The DWS's failure to address these substantial considerations establishes that their conclusions are not reasonable or rational.

3. Petitioner's response to unsupported allegations in Respondent's brief.

a. The DWS suggests that Petitioner refused to accept a $9/hour job offer after searching for work for almost a year. *Respondent's brief at 11*. Petitioner admits that refusal to accept suitable work can result in a denial of benefits. The unemployment rules require that unemployed individuals must reduce wage expectations "until it reaches the prevailing local wage for work in that occupation." U.A.C. R994-405-309(6)(c). Computer and Information Systems managers (the closest match to Petitioner's substantial employment history) can expect to earn on average $32.80/hour

(~$68,000/year) according to the DWS website. *See* http://jobs.utah.gov/wi/pubs/WnI/UOW/provoorem.pdf, available on April 3, 2004. Technical sales people (the closest match to Petitioner's most recent work history) can expect $30.60/hour (~$63,500/year) on average. *Id.* Even if the court accepts the DWS's allegation, computer support specialists (a position for which Petitioner was substantially *over*qualified) can expect $12/hour on average. *Id.* Thus, even the DWS's own data reveal the unsuitability of the job possibility under the rule. Furthermore, the record does not establish when the offer was presented and refused, or even if it was a bona fide work opportunity. (R. 21.)

b. The DWS suggests that work as a psychologist should have been pursued, since that was the area of Petitioner's undergraduate study. *Respondent's brief at 9.* It is axiomatic that psychologists require more education than a bachelor's degree, which is all Petitioner had attained. (R. 14.) As before, the DWS data also indicate that prospective work was more available in the computer industry than it was in the social science arena, justifying Petitioner's search in the area most familiar to him, and entirely encompassing Petitioner's professional career. *See DWS website* at http://jobs.utah.gov/wi/pubs/outlooks/state/statebriefmostopenings.pdf, available on April 3, 2004.

c. The DWS alleges that the Board did not have an opportunity to review the decision awarding benefits to Petitioner in October 2001, and, as a result, implies that such a decision is in no way binding upon the DWS as argued in Petitioner's Brief. *Respondent's brief at 10.* The DWS rules provide otherwise:

> "The [statute] requires that the Department be given notice of the pendency of an appeal and that the Department will be a party to the proceedings. ... As a party to the hearing the Department or its representatives have all rights and responsibilities of other interested parties to present evidence, bring witnesses, cross-examine witnesses, give rebuttal evidence, and appeal decisions of the Administrative Law Judge."

U.A.C. R994-406-313. Since the DWS did have the right to appeal, the court should rule in Petitioner's favor for the DWS's failure to justify their inconsistency as required by U.C.A. § 63-46b-16(4)(h)(iii).

Conclusion

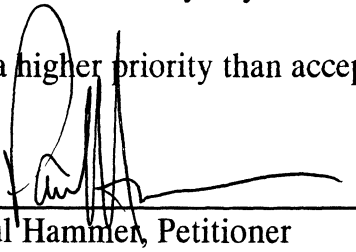
The DWS has attempted several avenues to obstruct Petitioner's access to unemployment benefits. In the Petitioner's first appeal, an ALJ for the DWS allowed benefits, concluding that Petitioner "is primarily a member of the labor market and only secondarily a student." (R. 65.) A few months later, the DWS denied benefits and a different ALJ concluded that the substantially identical fact pattern indicated that Petitioner was primarily a student. On Petitioner's appeal to the Board, the Board affirmed the denial of benefits, but claimed that Petitioner's work search had been inadequate.[3] Now, on appeal to this court, the DWS appears to retreat from the Board's primary reasoning and reasserts the ALJ's conclusion that Petitioner is primarily a student.

Though the reasoning for denying benefits has shifted back and forth, Petitioner has consistently maintained that providing for his family is his most important task, and

[3] The Board's reasoning was grounded on an ineffective work search, though, without additional analysis or discussion, the Board also adopted the ALJ's reasoning and conclusions. (R. 35.) The Board failed entirely to address any of the shortcomings identified in the Petitioner's appeal to that body. (R. 31-32.)

that he would drop out of school for work that can meet those needs. The DWS rules specifically require consideration of two factors under these conditions, yet the DWS has failed throughout all of these proceedings to provide anything more than cursory and conclusory analysis to the time in school and financial loss factors. An agency commits arbitrary and capricious action when they fail to abide by the established rules. For this reason, the court should reverse the Board's decision and award benefits to Petitioner.

An agency's conclusions are also subject to judicial review if the agency's conclusions are not supported by substantial evidence in the record. Courts will defer to an agency's decision when there is enough evidence to justify that the agency's decision is a reasonable conclusion based on the record evidence. However, such deference is not allowed when an agency ignores uncontroverted, competent, and credible evidence contrary to the agency's decision. Here, such evidence exists. The greatest evidence is found in Petitioner's position after completing school. Despite the substantial financial investment and forgone earning potential, Petitioner will still be in a position were he must still find employment. In addition, Petitioner's family's needs are only being met by taking student loans, which compromises the future stability of the family, especially where Petitioner must still secure employment. These are substantial justifications which establish the conclusion that Petitioner would leave school for work, and are uncontroverted by any evidence or theory explaining why remaining in law school would be a higher priority than accepting work.



Paul Hammer, Petitioner

CERTIFICATE OF SERVICE

I certify that two copies of Petitioner's Reply Brief, including any attachments and enclosures, were hand delivered to the Workforce Appeals Board, Respondent in this matter, on April 6, 2004 at the following address:

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Paul Hammer